

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KENITH LEE LAND**

## Claimant

VS.

**VINCE HALBERT d/b/a V & P TRUCKING**

Respondent

AND

**UNKNOWN**

Insurance Carrier

AND

# KANSAS WORKERS COMPENSATION FUND

Docket No. 204,533

## ORDER

The Kansas Workers Compensation Fund appeals from preliminary Nunc Pro Tunc Order dated January 4, 1996.

## ISSUES

The Fund has raised the following issues:

- (1) Are claimant's injuries covered by the Kansas Workers Compensation Act? The Fund argues claimant was not an employee and the Act does not apply.
- (2) Should the liability of the Kansas Workers Compensation Fund be liable pursuant to K.S.A. 44-532a. The Fund argues the Special Administrative Law Judge exceeded his jurisdiction by ordering the Fund to pay preliminary benefits where no evidence was presented relating to insolvency or insurance coverage.

The Fund also listed as an issue on Appeal: “Whether certain defenses apply.” From the record and briefs it appears this is not a separate issue but instead is intended to encompass the other two specific issues.

Respondent has raised the following additional issues:

- (1) Whether the appeal was timely filed;
- (2) Whether the issues raised by the Fund are jurisdictional issues subject to review on appeal.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs submitted by the parties, the Appeals Board finds and concludes:

(1) This appeal by the Kansas Workers Compensation Fund was timely filed in that it was filed within ten (10) days of the Nunc Pro Tunc Order. The Special Administrative Law Judge indicated at the close of the hearing he expected benefits to be paid by the Fund. As originally entered the Order did not, however, require the Fund to pay benefits. The Nunc Pro Tunc Order corrected the original Order and required benefits be paid by the Fund. The time for the Fund to file the appeal should be the effective date of the Nunc Pro Tunc Order, the only order which imposes liability on the Fund.

(2) The argument that claimant was not an employee raises an issue regarding whether the injury arose out of and in the course of employment and therefore raises a jurisdictional issue. K.S.A. 44-534a. The Appeals Board agrees with the finding that the claimant was an employee of the respondent at the time of the injury.

The evidence established that claimant's work involved driving a truck owned by Vince and Peggy Halbert, V & P Trucking, hauling cars. He loaded and unloaded cars and delivered them in forty-eight (48) states. He would pick up the truck at Vince Halbert's home in Belle, Missouri, and make such pick up and delivery runs as Vince Halbert directed. The evidence also indicates that claimant was paid a percentage of the payment for the particular haul and no taxes or social security was withheld from his payment. The Appeals Board finds the circumstances indicate that respondent had the right to control and, accordingly, claimant should be considered an employee of respondent for purposes of workers compensation. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(3) The challenge to the order for benefits to be paid by the Fund does not raise an issue subject to appeal from a preliminary order. Impleading of the Fund gives the Special Administrative Law Judge jurisdiction over the Kansas Workers Compensation Fund. The fact that the case involves an injury arising out of and in the course of employment gives the Special Administrative Law Judge jurisdiction over the subject matter. The decision to require payment by the Fund constitutes a legal ruling that the Fund should have the burden of proving ability to pay or existence of insurance coverage. Whether this ruling is correct or incorrect is not for the Appeals Board to decide at this stage of the proceedings, it is a ruling which the Special Administrative Law Judge has the jurisdiction to make.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Special Administrative Law Judge William F. Morrissey dated December 14, 1995 as corrected by Nunc Pro Tunc Order dated January 4, 1996, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Rodney C. Olsen, Manhattan, Kansas  
Richard H. Seaton, Manhattan, Kansas  
Jeff K. Cooper, Topeka, Kansas  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director